

109 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Marathon LNG Marketing, LLC

Docket No. RP04-326-000

ORDER DISMISSING REQUEST FOR DECLARATORY ORDER
WITHOUT PREJUDICE

(Issued October 7, 2004)

1. On June 7, 2004, Marathon LNG Marketing LLC (Marathon) filed a petition for a declaratory order pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure.¹ Marathon requests the Commission to declare that the Redelivery Option, a provision in the liquefied natural gas sales contract (LNG Sales Contract) between Marathon and BG LNG Services (BG LNG), is not a prohibited buy/sell arrangement as BG LNG asserts. Alternatively, if the Commission determines that the Redelivery Option is a prohibited buy/sell arrangement, Marathon requests the Commission to grant any necessary waivers to allow the contract to be implemented according to its terms or require the provision at issue to be restructured as a prearranged capacity release by BG LNG to Marathon.
2. For the reasons discussed below, we will dismiss the petition without prejudice to refiling. Dismissing the petition is in the public interest because it allows the parties additional time to resolve their dispute with respect to the Redelivery Option through negotiation.

¹ 18 C.F.R. § 385.207(a)(2) (2004).

I. Background

3. The LNG Sales Contract provides for the sale of LNG by Marathon to BG LNG,² a capacity holder on Southern LNG Inc.'s (Southern LNG) open access Elba Island LNG Terminal³ near Savannah, Georgia. Under the contract provision at issue (Redelivery Option), BG LNG would buy LNG from Marathon at the inlet of the terminal and sell the regasified LNG back to Marathon at the terminal's tail gate.

4. Marathon and BG LNG are successors-in-interest to the original contracting parties, Enron Americas LNG Company (Enron LNG) and Southern Energy Services (Sonat Energy), respectively.⁴ The LNG Sales Contract was the negotiated resolution of Enron LNG's protest to Southern LNG's awarding of the entire initial capacity at Elba Island to its marketing affiliate, Sonat Energy, in the proceeding approving the reactivation of the Elba Island Terminal.⁵ Upon conclusion of the negotiated resolution,

Enron LNG withdrew its protest stating that it had "negotiated a commercial resolution

² On April 19, 2004, in Docket No. 04-39-LNG, the U. S. Dept. of Energy, Office of Fossil Energy issued DOE/FE Order No. 1977, as amended in Order No. 1977-A on August 17, 2004, authorizing BG LNG to import LNG pursuant to the LNG Sales Contract with Marathon that is at issue in this proceeding.

³ BG LNG holds capacity on the Elba Island facility along with British Gas Trinidad and Tobago, Ltd., Point Fortine LNG Exports Ltd., and Shell LNG.

⁴ Marathon became Enron LNG's successor when it purchased the LNG Sales Contract for \$32 million in Enron Corp.'s bankruptcy proceeding on August 30, 2002. El Paso Merchant Energy, L.P. (EPME), El Paso Energy Corp.'s (El Paso) marketing arm, became Sonat Energy's successor to the LNG Sales Contract after a merger between El Paso and Sonat Inc. Subsequently, EPME permanently released 100 percent of its long-term firm capacity rights at Elba Island to BG LNG (4 Bcf of storage, 446 MMcf/d of firm vaporization capacity) for \$127 million and assigned to BG LNG and BG Gas Marketing LTD all of its gas sales contracts at Elba Island, including the LNG Sales Contract at issue in this proceeding.

⁵ *Southern LNG, Inc.*, 89 FERC ¶ 61,314 (1999)(PD); 90 FERC ¶ 61,257 (2000)(order issuing certificate). *See also Southern LNG, Inc.*, 94 FERC ¶ 61,188 at p. 61,661 (2001).

regarding the future use of the Elba Island Terminal” with Sonat Energy.⁶ No party filed the contract with the Commission or sought Commission approval of it.

5. The LNG Sales Contract consists of a Letter Agreement and an attached Term Sheet. The Letter Agreement provides that the parties are to enter into a Definitive Agreement with the principal terms set out on the Term Sheet. The disagreement between the parties with respect to the Redelivery Option arose in their negotiations to finalize the Definitive Agreement.

6. The Letter Agreement provides that if the parties are unable to agree completely on the terms of a Definitive Agreement they shall refer all unresolved matters to an expert, who has been appointed, for resolution. Each party must submit proposed contract language to the expert who is to select one of the two proposals without modification. The expert is to be guided by, among other considerations, consistency with the Southern LNG’s FERC Gas Tariff and service agreements with FERC-regulated facilities. If the parties do not agree to refer a dispute to the expert, the contract calls for the dispute to be settled by final and binding arbitration.

II. Marathon’s Petition

7. Marathon submits that the Redelivery Option is not a buy/sell arrangement because it does not involve the disposition of interstate capacity in violation of Commission policy. Rather, Marathon asserts, it is part of an LNG sales contract, the prices, terms, and conditions of which were deregulated by the Energy Policy Act of 1992,⁷ and therefore the contract lies outside of the Commission’s jurisdiction.

8. Marathon contends that the LNG Sales Contract was intended to create competition where none existed in response to Sonat Energy’s protest that Southern LNG and its affiliates were attempting to control all of the Elba Island capacity, the import of LNG, and the sale of regasified LNG into the marketplace. Marathon argues that the Commission should permit the Redelivery Option to be implemented because BG LNG’s

refusal to acknowledge the legality of the Redelivery Option is thwarting Marathon’s ability to compete in the marketplace downstream of Elba Island and Marathon has a

⁶ See Enron LNG’s October 13, 1999 Notice of Withdrawal of Protest in Docket Nos. CP99-579-000, *et al.*

⁷ Pub. L. No. 102-486, 106 Stat. 2776 (1992).

major investment in the LNG sales contract

9. If the Commission finds that the Redelivery Option is a prohibited buy/sell arrangement, Marathon requests any waivers necessary to allow the parties to implement it according to its terms as contemplated by the parties to the LNG Sales Contract. If the Commission does not grant a waiver, Marathon requests the Commission to order BG LNG to work with Marathon to restructure the Redelivery Option as a prearranged capacity release which would allow it to operate as anticipated in the LNG Sales Contract, consistent with Southern LNG's tariff and the Commission's rules. Finally, failing any of these options, Marathon asserts that the Commission should reopen the 1999 Enron LNG protest to determine whether BG LNG's predecessor-in-interest improperly obtained 100 percent of the initial capacity at Elba Island.

III. Notice and Interventions

10. Notice of Marathon's petition was published in the *Federal Register* on June 21, 2004, 69 Fed. Reg. 34342). Timely, unopposed motions to intervene were filed by Atlanta Gas Light Company and Chatanooga Gas Company, jointly, BG LNG, BP America Production and BP Energy Company, jointly, Shell NA LNG LLC (Shell LNG), and Shell Offshore, Inc.⁸ Untimely motions to intervene were filed by Alabama Gas Corporation, ChevronTexaco Natural Gas, a division of Chevron U.S.A. Inc., and South Carolina Pipeline Corporation, Public Service Company of North Carolina, Inc. and Scana Energy Marketing, Inc., jointly. We will grant the untimely motions to intervene because to do so will not disrupt the proceeding or prejudice or additionally burden any other party.⁹

11. BG LNG filed an answer to Marathon's petition to which Marathon filed an answer. Although section 385.213(a)(2) of our Rules of Practice and Procedure does not permit answers to answers, we may waive this rule for good cause shown, and do so in this instance to help clarify the issues under consideration. America Production and BP Energy Company, jointly, and Shell LNG filed comments on the petition.

⁸ Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214(c) (2004)).

⁹ See Rule 214(d) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214(d) (2004)).

IV. BG LNG's Answer

12. BG LNG argues that the Commission should dismiss Marathon's petition as premature because it concerns a contract with a mandatory arbitration provision and Marathon has not sought arbitration. In fact, BG LNG states, the parties have just begun to negotiate their contract and neither party has submitted language to the appointed expert much less proceeded to formal arbitration. BG LNG argues that granting declaratory relief would send a negative signal to the LNG market since LNG producers negotiate supply arrangements on the assumption that they will be considered nonjurisdictional agreements and that disputes arising under the agreements will be resolved according to arbitration provisions contained in virtually all LNG sales agreements. BG LNG also asserts that the Federal Arbitration Act strongly favors the enforceability of arbitration provisions.¹⁰

13. BG LNG states that dismissal also is appropriate because a finding that the Redelivery Option is not a buy/sell arrangement will not resolve the dispute with Marathon since Marathon believes the preconditions to its exercise of the option are unworkable and the preconditions are not before the Commission.¹¹

14. If the Commission does not dismiss Marathon's petition, BG LNG argues that the Commission should find that the Redelivery Option is a prohibited buy/sell arrangement and deny the other relief sought by Marathon.

V. Comments

15. Shell LNG, an LNG importer and the holder of expansion capacity at Elba Island, comments that Marathon's suggestion that Enron's protest would have to be reinstated if the Commission denies Marathon's petition in its entirety must be rejected as an impermissible collateral attack on a final order. Shell LNG also states that, although the Commission has jurisdiction to declare the Redelivery Option to be a buy/sell

¹⁰ 9 U.S.C. § 1, *et seq.* (2004).

¹¹ The Redelivery Option can only be exercised in 10,000 MMBtu/d increments for a minimum 21-month term, the gas must be taken ratably, and the delivery volumes must be delivered on a reasonably ratable basis. If Marathon nominates its regasified LNG for transportation on Southern Natural Gas Co., Marathon, or its affiliates, must have contracted for firm transportation capacity for a term of not less than 10 years or the remaining term of the LNG Sales Contract in an amount covering the entire redelivery quantity.

arrangement contrary to its policy, the Commission does not have jurisdiction to direct the parties to revise their nonjurisdictional LNG contract in a particular manner.

16. BP America Production and BP Energy Company comment that, if the Commission either finds that the Redelivery Option is not a prohibited buy/sell or waives the prohibition of buy/sells, the Commission should ensure that the finding is expressly limited to LNG terminals and would not be applicable to transactions on interstate pipelines.

VI. Discussion

17. In the past, the Commission has denied declaratory relief where a dispute concerned a FERC-jurisdictional contract with a mandatory arbitration provision and the petitioner had not yet sought arbitration.¹² In addition, on many occasions, the Commission has strongly encouraged contractual parties to avail themselves of arbitration procedures consistent with the Federal Arbitration Act.¹³ We recognize that, in contrast, Commission precedent suggests that contractual mandatory arbitration provisions do not apply when the dispute implicates the Commission's duty to enforce its regulations.¹⁴ However, that proceeding involved a dispute over an existing jurisdictional contract. Here the parties are attempting to structure a new Definitive Agreement consistent with the LNG Sale and Purchase Agreement Term Sheet contained in Exhibit A of the Letter Agreement.

18. The disagreement between the parties with respect to the Redelivery Option arose in their negotiations to finalize the Definitive Agreement. On March 9, 2004 Marathon sent to BG LNG a list of issues including the Redelivery Option that it would like to see addressed in the Definitive Agreement. On April 5, 2004, BG LNG sent a draft of a definitive agreement to Marathon. The parties have had one formal meeting to discuss that draft. Marathon has proposed a resolution of two of the two dozen issues on its original issues list but has otherwise not provided anything in writing.

19. Although the Letter Agreement provides that if the parties are unable to agree completely on the terms of a Definitive Agreement they shall refer all unresolved matters

¹² See, e.g., *Texas-New Mexico Power Co. v. El Paso Elec. Co.*, 30 FERC ¶ 61,242 (1985).

¹³ 9 U.S.C. § 1 *et seq.* (2004).

¹⁴ See, e.g., *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588 (3d Cir.); *cert. denied*, 434 U.S. 1062 (1977).

to an expert for resolution, neither party has done so. BG LNG states that Marathon has not made a single comment on BG LNG's draft definitive agreement nor countered with a definitive agreement of its own. Marathon contends that negotiations are in a stalemate because BG LNG has taken a non-negotiable position that the Redelivery Option is an illegal buy/sell arrangement that it will not honor. BG LNG states that it has no present intention of submitting proposed language to the expert since it is still trying to negotiate a resolution with Marathon.

20. Since it appears that the parties are still in the initial stages in their negotiation to arrive at a Definitive Agreement, the Commission is reluctant to intervene at this time in their dispute with respect to the Redelivery Option. The Redelivery Option is but one of a multitude of terms contained in the Term Sheet and since in any commercial negotiation there are tradeoffs among issues, it is possible that the parties may restructure the Redelivery Option to accomplish the intent of the provision in a manner that BG LNG will not consider to be illegal or otherwise come to a mutually satisfactory resolution without Commission involvement. Further, the Letter Agreement requires the parties to submit any unresolved matters with respect to the Definitive Agreement to an expert, which neither party has done.

21. The parties should refine their positions through negotiations that possibly could eliminate the need for the Commission's involvement in resolving their dispute. Therefore, we will dismiss Marathon's petition without prejudice to refiling if necessary after they have availed themselves of the agreed upon procedures for structuring the Definitive Agreement.

22. Finally, we note that the Commission is not bound by an expert's or arbitrator's decision that implicates matters within the Commission's exclusive jurisdiction such as the disposition of capacity on jurisdictional facilities.

The Commission orders:

Marathon's petition is dismissed without prejudice as discussed in the body of this order.

By the Commission. Commissioner Brownell concurring with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Marathon LNG Marketing, LLC

Docket No. RP04-326-000

(Issued October 7, 2004)

BROWNELL, Commissioner, concurring:

Marathon and BG LNG are negotiating a liquefied natural gas sales contract. If the parties are unable to completely agree on the terms of the contract, they will refer all unresolved matters to an expert for resolution or submit to binding arbitration. One term of the contract being negotiated is a Redelivery Option. The Redelivery Option provides that BG LNG would buy LNG from Marathon at the inlet of the terminal and sell the regasified LNG back to Marathon at the terminal's tailgate, with title transferring on each transaction.

Marathon contends that negotiations are in a stalemate because BG LNG has taken a non-negotiable position that the Redelivery Option is an illegal buy/sell arrangement that it will not honor. BG LNG states that it has no present intention of submitting proposed language to an expert or an arbitrator since it is still trying to negotiate a resolution with Marathon. Marathon now asks the Commission to decide whether the Redelivery Option is a buy/sell arrangement that is contrary to Commission policy and, therefore, unenforceable.

The majority determines it is premature to provide an answer since there is no final agreement and the parties have not availed themselves of the expert. I support the enforcement of contractual provisions for arbitration of contract interpretation disputes. This case, however, does not involve a dispute over the interpretation of a contract term, but rather the enforceability of a potential contractual approach under the Commission's regulations. I would have given the parties an answer in order to clarify our "rules of the road" to aid them in structuring their business transaction. I believe that provision of guidance on the legality of potential contractual arrangements is not intrusive but essential to conducting business in the energy industry. I would have answered the following questions. Is the Redelivery Option a buy/sell arrangement? If so, it is unenforceable under current Commission. Can the Redelivery Option be restructured as a capacity release arrangement that would be acceptable? If so, I would provide such guidance to the parties. Finally, has the change in our LNG policy, set out in *Hackberry*, rendered the buy/sell policy (and other open access requirements) inapplicable to transactions at LNG terminals?

Providing answers to these questions will ensure that the parties do not waste their time and resources negotiating the details of the contract. Further, our guidance will provide regulatory certainty. Regulatory certainty decreases inefficiencies and reduces costs to consumers. For these reasons, I would have given Marathon an answer and, therefore, will concur.

Nora Mead Brownell
Commissioner